[COURT OF CRIMINAL APPEAL]
McELWAINE, C.J., TERRELL,
& MILLS, JJ.
August 19, 1938.

MANGGAL SINGH v. THE KING.

[SINGAPORE CRIMINAL APPEAL No. 19 of 1938]

Admissibility of evidence — accused was examined on the existence of a custom among the Sikhs of mutilating unfaithful women.

Held, that the evidence of such a custom among Sikhs generally is of no value for the purpose of identifying the particular Sikh with a commission of an offence. It might be admissible merely to prove the manner in which the motive might be expected to operate.

CRIMINAL APPEAL.

Appellant in person.

Howe, Crown Counsel, for the Crown.

Cur. Ad. Vult.

McELWAINE, C.J.—I agree that this appeal should be dismissed even if my doubts as to the legitimacy of the cross-examination of the accused on the Sikh custom of mutilating unfaithful women are well founded.

It was sought to justify this line of cross-examination on two grounds, first as evidence of identity, secondly as evidence of motive.

In *Thompson* v. *The King*, (1918) A.C. 221, relied upon by Mr. Howe, the evidence related to the accused's own conduct; in the case before us the evidence relates to the conduct of Sikhs in general and not of the accused in particular.

Even if such mutilation is not practised among other Indian races besides Sikhs, it appears to me to provide no evidence of the identity of the accused with the person who mutilated the woman.

Evidence can, of course, be given of any matter which is relevant to the issue other than evidence of bad character. Such extraneous evidence usually relates to other offences and is admissible if it tends to prove:—

(a) the identity of the accused with the person who committed the crime charged; (*Thompson* v. *The King*, (1918) A.C. 221) or

(b) the intent or knowledge with which the act charged was done; *Rex* v. *Ollis*, (1900) 2 Q.B. 758) or

(c) that the accused did the act charged (*Rex* v. *Ball*, (1911) A.C. 47) or

(d) that the act was not the result of accident or mistake in cases where a defence of accident or mistake is open (*Makin* v. *The Attorney-General of New South Wales*, (1894) 1 A.C. 57).

Facts shewing system and motive are only illustrations of facts which tend to prove identity, knowledge or intent, or to disprove accident or mistake.

The evidence of Sikh custom appears to me primarily to suggest that because Sikhs mutilate unfaithful women therefore the accused being a Sikh would commit the same crime which appears to me to be one remove from giving evidence that an accused is addicted to a particular kind of crime to prove him guilty of a specific offence.

A person may be identified by his own conduct or by his own attributes but he cannot be identified by the habits of a class even if he belongs to that class. "There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime" *per* Lord Sumner in *Thompson* v. *The King*, (*supra*) at page 234.

The accused set up an alibi defence and suggested that some one else committed the crime—perhaps one of kongsi of Sikhs to which the accused said that the woman belonged.

The learned trial Judge in his charge to the jury said:—

> "You have heard in the witness-box the accused admit that it is the custom among high-caste Sikhs, when their wives have committed adultery and have gone off with lower-caste Sikhs or persons, to disfigure such women as a punishment. That is to say it was the custom existing in India years ago. He also said that he was a man who had served his country as a soldier would not do such a thing. But there is his admission of the practice having existed."

From this a jury may have been led to think that because Sikhs in India mutilate unfaithful women in this way the accused is to be taken as being identified from the fact that he is a member of a race which does such things as the mutilator of Narain Kaur.

The jury was not told that the evidence was at least consistent with any other Sikh having committed the crime.

The evidence does not tend to identify the accused. Rather might it suggest that Sikhs commit a particular sort of crime; the accused is a Sikh therefore the accused committed the crime, and there is nothing in the summing up to dispel this idea.

Then it is suggested that the Sikh custom proves motive. It is some evidence that this particular mode of punishment obtains among Sikhs in India.

A South African case *Rex* v. *Kumalo & Nkosi*, (1918) App. D. 500 is noted in 14 English & Empire Digest 367 in which a practice of mutilation to obtain human fat as a charm was held to be admissible in evidence. This evidence proved a motive for the murder—to obtain a charm. But the Sikh custom does not prove a motive for mutilating the woman. The motive was her alleged infidelity.

The South African case is quite different. The mode of killing shewed the purpose of the killing. It shewed that the killing was to obtain a charm from part of the child's body and this purpose was just as much motive as is robbery.

The mutilation of the child was not motive; it was evidence of what the motive was.

If it is permissible to prove, as a step towards establishing the present accused's guilt, that other Sikhs commit this kind of crime, then if a man is charged with bestiality or other unnatural offence, is it permissible to prove that the accused's race does not consider such offence wrong, or to prove that it is addicted to such unnatural offence? This, I think, would go further than anything which is allowed under our system of evidence.

I understand my brethren not to go so far as this.

But if their view is that, it having been proved *aliunde* that the accused had a motive, the cross-examination was permissible to explain the motive or to shew how the motive would operate on a Sikh aggrieved by the conduct of the woman, then it seems to me that the only tendency of the cross-examination is to attempt to identify the accused as the criminal by proof of the criminal propensity of his race in taking this form of revenge.

I think the custom too remote to identify the accused in any way. My objection to it is that it suggests that the accused belongs by birth and race to a criminal class and such a suggestion might possibly be prejudicial. "It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is to be observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues", *Maxwell* v. *D.P.P.*, 24 Cr. App. R. at 176.

Evidence that an accused person has committed the same kind of crime before may be logically relevant but, save in exceptional cases is legally inadmissible. How is this evidence that other people commit the kind of crime admissible?

"When it is sought to justify a question, it must be capable of justification according to the general rules of evidence and, in particular, must satisfy the test of relevance" *per* Sankey, L.C. in *Maxwell* v. *Director of Public Prosecutions* 50 T.L.R. 499, 24 Cr. App. R. at 171.

If the evidence identified or tended to identify the accused with the mutilator of the woman Narian Kaur, it would be admissible, but in my opinion this evidence of Sikh custom did not tend to identify the accused but might possibly have been prejudicial as tending to shew that the accused from his race was the kind of man who would commit this crime.

Then it was argued that if this was an effect of the evidence, it was admissible as the accused had given evidence of his own good character.

Even if the accused's statement "I was an Indian officer and I would not do such a thing for the sake of my reputation" is such evidence of good character as would permit evidence of bad character to be given, evidence of the criminal propensities of other Sikhs is no evidence that the accused is a bad character.

But assuming the foregoing views to be correct, the evidence was not necessarily prejudicial, the relevant evidence was such that the jury must have convicted if the evidence of Sikh custom had not been given. The jury had before them the injured woman Narian Kaur herself. She swore that it was the appellant who had cut her nose, lips and ears. A European lady was quickly on the scene: so were police, and Narian Kaur then made a report to Inspector Shears in which she gave the name of her assailant as Manggal Singh.

This is most important having regard to the suggestion of the accused that the unfortunate woman had been incited to name the accused instead of the true assailant.

Salleh bin Hadji Mohamed Yassain said he saw the accused run away. In face of this evidence it is not surprising that the feeble Penang alibi was disbelieved.

I agree that the appeal should be dismissed.

TERRELL & MILLS, JJ.—The accused was convicted of causing grievous hurt to one Narain Kaur (who had been his mistress for some years) by cutting off her nose, lips and ears.

The accused's defence was an alibi.

There was ample evidence to justify the conviction but as the accused was not represented on the appeal the Court suggested to Crown Counsel that certain questions put to the accused in cross-examination were inadmissible.

The accused was a high caste Sikh, and the questions were intended to establish that by running off with a low caste Sikh, the woman had brought shame on the accused, and that in such cases the errant woman according to Sikh custom deserved the disfigurement which was meted out to her. The accused admitted the existence of the custom, but said that he was an Indian Officer and would not do such a thing.

Crown Counsel supported the line of cross-examination on two grounds, (1) to prove identity, and (2) to prove motive. Crown Counsel submitted that the evidence was not evidence of character at all, but that in any case the accused had put his good character in evidence and he submitted in the alternative that it was accordingly permissible, under section 54 of the Evidence Ordinance, to show that the accused had a bad character.

To deal first with the alternative submission, it would certainly appear from the record that the accused put his good character in evidence. In fact, apart from the defence of alibi which will

be dealt with later, the substance of the defence was that he was an Indian Officer of high charcter. He says "As I was an Indian Officer, I would not do such a thing to bring shame on myself."

If therefore the cross-examination was directed to prove that the accused was of bad character, it would certainly appear to be admissible under the express terms of the section. But in our opinion the cross-examination was not directed to character at all. The existence of a custom affecting Sikhs generally does not affect the character of any individual Sikh.

As regards the admissibility of the evidence as establishing the identity of the accused, the case of *Thompson* v. *The King*, (1918) A.C. 221 was relied on. It does not appear that this case is any authority for the introduction of evidence of custom. The evidence in *Thompson's* case was evidence of certain matters personal to Thompson himself which tended to identify him with the offence which was charged. The evidence of a custom among Sikhs generally is of no value for the purpose of identifying a particular Sikh with the commission of the offence.

There remains the question of motive. The law on the subject is contained in sections 8 and 14 of the Evidence Ordinance. Section 8 provides that any fact is relevant which shows or constitutes motive, and section 14 makes admissible facts showing the existence of a state of mind such as intention, knowledge, ill-will towards any particular person etc.

It was proved in evidence, and not denied by the accused, that the woman had been his mistress for many years, and that she had brought shame on him by leaving him for some one else, and deserved punishment. The prosecution accordingly established a motive. The cross-examination was directed to establishing that, the motive having been proved, it might well find expression in the mutilation of the unfaithful mistress when the person upon whom the motive operated was a Sikh. In a South African case *Rex* v. *Kumalo, and Nkosi*, referred to in 14 English and Empire Digest at page 367, evidence was admitted to prove a custom among Zulu tribes and especially among witch doctors, to kill and mutilate young persons, and use portions of the body as a charm against ill-luck, and that the accused was a Bacera, an offshoot of the Zulu tribe. In that case evidence of the custom was admitted to prove a motive. Here the motive is already proved, and the custom is admissible merely to prove the manner in which the motive might be expected to operate. In the South African case evidence of custom was admitted to prove (a) a motive and (b) how the motive would operate. In the present case the evidence is only directed to (b), and the South African case accordingly goes much further.

As regards the alibi, it is suggested that the following passage in the summing up is open to objection:—

> "It is always advantageous to an accused person to disclose an alibi as quickly as possible: and when you see an intelligent person keeping an alibi up his sleeve till the very last moment you are entitled to draw an adverse conclusion from that fact."

A little later the learned trial Judge says:—

> "Gentlemen you will approach the consideration of your verdict from the point of view that the accused is innocent until the charge has been proved against him; and it must be established in your mind beyond all reasonable doubt that he did commit this offence before you can find him guilty of it. It is not for the accused to prove his innocence: it is for the Prosecution to prove him guilty. If after considering the whole of the evidence you are left in a state of reasonable doubt, then of course the Crown have not proved their case and you must acquit the accused."

There is no doubt that in his summing up a trial Judge is entitled to comment upon a failure to disclose an alibi at an early stage, *Rex* v. *Littlebou* (1934) 2 K.B.408, and taking the passages cited above in conjunction, it cannot be disputed that the learned Judge's observations were made "with care and with fairness to the accused person in all the circumstances of the case" (see *Rex* v. *Littleboy* at page 415).

In his evidence at the Assizes the accused attempted to prove that he was in Penang on the date of the offence, the 20th January 1938, and subsequently went to Batu Pahat where later he was arrested. At the preliminary enquiry he only told the Magistrate that he wished to call his son and the clerk of the Japanese mine at Batu Pahat. Not only therefore did he not disclose his Penang alibi, but there is an almost irresistible inference that he intended to prove that he was at Batu Pahat on the day in question. In these circumstances the learned trial Judge was perfectly justified in warning the jury that they might "draw an adverse conclusion," i.e. reject the alibi defence. That does not mean that the failure of the alibi corroborated the prosecution. The prosecution must rely on its own substantive evidence and must discharge the onus which is placed on it by law, and the learned judge in effect so directed the jury.

In our opinion the objections that certain evidence was wrongly admitted and that the jury were misdirected both fail, and the appeal is dismissed.

Appeal dismissed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.